Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DENNIS LEE HENDRIX, Individually and in his Official capacity as Sheriff of Forsyth County, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, DAVID W. WATERS, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, PETITIONERS

v.

DANNY M. BENNETT AND DANNY L. REID

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition for writ of certiorari arises out of the denial of Petitioners' assertion of qualified immunity from Respondents' First Amendment retaliation claim. Rejecting Petitioners' qualified immunity defense, the United States Court of Appeals for the Eleventh Circuit decided an issue of first impression for that court: What is the appropriate standard for assessing whether a private citizen plaintiff has suffered an "adverse action" sufficient to support a First Amendment retaliation claim.

In resolving this issue, the Eleventh Circuit, joining several other Courts of Appeals, determined the appropriate test is the "ordinary firmness" test, under which a plaintiff suffers an adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights. In so doing, the Eleventh Circuit rejected decisions from the United States Courts of Appeals for the First and Second Circuits applying an "actual chilling" test, under which a plaintiff must show that the defendant's actions had some actual, non-speculative chilling effect on his or her First Amendment rights.

This petition presents the following significant issues:

1. Whether this Court should adopt the "actual chilling" test (applied by the First and Second Circuits) or the "ordinary firmness" test (applied by several Courts of Appeals including the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits) in assessing the adverse action requirement of a First Amendment

retaliation claim brought by a private citizen.

2. Whether the law can be sufficiently clearly established to defeat a government official's qualified immunity when the central issue of the case is one of first impression in the governing circuit and conflicting decisions exist on the issue outside that circuit.

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The published opinion of the Eleventh Circuit in *Bennett v. Hendrix*, Case No. 04-12256, 423 F.3d 1247 (11th Cir. 2005), filed September 9, 2005, affirming the district court's denial of Petitioners' assertion of qualified immunity from suit on summary judgment, is reproduced in the Appendix hereto. (Pet. App. 1a-19a).

The unpublished order of the United States District Court for the Northern District of Georgia (Atlanta Division) in *Bennett v. Hendrix*, Case No. 1:00-CV-2520-TWT, filed April 13, 2004, denying Petitioners' assertion of qualified immunity on summary judgment, is reproduced in the Appendix hereto. (Pet. App. 20a-33a).

The unpublished order of the Eleventh Circuit in *Bennett v. Hendrix*, Case No. 04-12256, filed November 7, 2005, denying Petitioners' petition for rehearing en banc, is reproduced in the Appendix hereto. (Pet. App. 34a).

JURISDICTION

In its September 9, 2005 opinion, the Eleventh Circuit affirmed the district court's denial of Petitioners' assertion of qualified immunity on summary judgment. Petitioners timely filed a petition for rehearing en banc on September 30, 2005, which was denied by the Eleventh Circuit on November 7, 2005. (Pet. App. 34a).

This petition for writ of certiorari is filed within 90 days of the date of the Eleventh Circuit's denial of

Petitioners' petition for rehearing en banc pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.3 and 30. This Court has jurisdiction to review on a writ of certiorari the Eleventh Circuit's opinion pursuant to 28 U.S.C. § 1254(a); 28 U.S.C. § 1291; and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

RELEVANT PROVISIONS INVOLVED

U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This 42 U.S.C. § 1983 case arises out of Danny Bennett's, Danny Reid's ("Respondents"), and Tammy Bennett's[1] allegations that Sheriff Dennis Lee Hendrix, Deputy Earl Singletary, and Major David Waters ("Petitioners") retaliated against them for their political support of a referendum. This referendum would have transferred the primary law enforcement powers from the existing Sheriff's Department and create a new county-wide police force that would be under the direct supervision of the county commission. (R14-176-3; R16-233-1). Sheriff Hendrix did not support the referendum, and the referendum was ultimately defeated. (R14-176-3; R16-233-2-3).

Respondents allege Sheriff Hendrix retaliated against them as a result of their support for the referendum by directing Deputy Singletary, Major Waters, and other county officers to engage in acts of surveillance and harassment. (R1-1-16-17; R14-176-14; R16-233-3). Respondents also contend that Sheriff Hendrix retaliated against them in connection with his re-election campaign by disseminating campaign fliers that personally attacked Respondents. (R14-176-4-5).

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[1] The district court granted summary judgment to Petitioners as to the claims brought by Tammy Bennett, and thus she is not a party to this appeal. (Pet. App. 18a n.2).

On September 28, 2000, Danny Bennett, Danny Reid, and Tammy Bennett filed this civil rights action. (R1-1-1). As relevant here, Respondents alleged that Petitioners violated the First Amendment by retaliating against them as a result of their political support for the Forsyth County referendum, conspired to deprive them of their constitutional rights under 42 U.S.C. §§ 1983 and 1985(3), and violated their equal protection rights by discriminating against them in retaliation for the exercise of their First Amendment rights. (R1-1-27, 39, 41, 43). Respondents also brought claims against Petitioners for violations of the Fourth Amendment and substantive due process, as well as a supervisory liability claim against Sheriff Hendrix and Deputy Singletary and various state law claims. (R1-1-33, 38, 42).

On June 21, 2001, the district court granted Petitioners' motion to dismiss as to all counts, except for Respondents' First Amendment, equal protection, and § 1983 conspiracy claims. (R6-89-36; R14-176-7, 22). Thereafter, on February 1, 2002, the district court granted in part and denied in part Petitioners' motion for summary judgment. (R14-176-48).

In particular, the district court granted Petitioners' motion for summary judgment with respect to (1) Respondents' First Amendment retaliation claim based upon Sheriff Hendrix's campaign fliers; (2) Tammy Bennetts' First Amendment retaliation claim; and (3) Respondents' equal protection claim. (R14-176-12, 15, 23). The district court, however, denied Petitioners' motion with respect to (1) Respondents' First Amendment retaliation claim based on Petitioners' alleged surveillance and harassment and (2)

Respondents' § 1983 conspiracy claim. (R14-176-18, 21). In regard to Petitioners' assertion of qualified immunity as to these claims, the district court determined that based on the record before it, it must "defer ruling on the qualified immunity defense until after the evidence at trial has been presented." (R14-176-28).

Petitioners thereafter appealed the deferral/denial of their qualified immunity to the Eleventh Circuit. (R14-186-1; R16-209-1). Following oral argument, the Eleventh Circuit vacated the district court's decision, concluding Petitioners had met their initial burden on qualified immunity of showing they were acting within their discretionary authority. (R16-222-4-5). Accordingly, the Eleventh Circuit remanded the case to the district court to analyze whether Petitioners are entitled to qualified immunity. (R16-222-5).

On April 13, 2004, the district court issued its order following the Eleventh Circuit's remand, denying Petitioners' qualified immunity defense. (R16-233-15). Following Petitioners' appeal from this decision, (R16-235-1), the Eleventh Circuit issued its opinion on September 9, 2005, denying Petitioners qualified immunity from suit. (Pet. App. 1a-19a). Petitioners thereafter filed a timely petition for rehearing en banc of this decision, which the full Eleventh Circuit denied on November 7, 2005. (Pet. App. 34a).

REASONS FOR GRANTING THE PETITION

A. Certiorari Should Be Granted To Resolve The Conflict Between The Courts of Appeals

This petition affords the Court with an opportunity to clarify the law and resolve a conflict between the Courts of Appeals concerning the appropriate standard to apply in assessing whether a private citizen plaintiff has suffered an "adverse action" sufficient to support a First Amendment retaliation claim.

The Eleventh Circuit, joining several other Courts of Appeals, determined the appropriate test is the "ordinary firmness" test; that is, "'[a] plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.'" (Pet. App. 6a); *see, e.g.*, *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005); *Keenan v. Tejeda*, 290 F.3d 252, 259 (5th Cir. 2002); *Tucker v. City of Richmond*, 388 F.3d 216, 220 (6th Cir. 2004); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982); *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003); *Mendocino Envtl. Ctr. v. Mendocino*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001).[2]

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[2] The Eleventh Circuit also cited decisions from the First, Second, Third, and D.C. Circuits as support for the "ordinary firmness" test. (Pet. App. 6a-7a). None of these decisions, however, involved First Amendment claims brought by private citizens, such as this case. *See Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209,

In so doing, the Eleventh Circuit rejected Petitioners' assertion that the proper test is the "actual chilling" test, under which a plaintiff must show that the defendant's actions had some actual, non-speculative chilling effect on his or her First Amendment rights. Significantly, the Eleventh Circuit's decision is in conflict with decisions of the First and Second Circuits, which have applied the "actual chilling" test. *See Sullivan v Carrick*, 888 F.2d 1, 4 (1st Cir. 1989) ("To show a First Amendment violation in this context [plaintiff] must allege that his speech **was in fact** chilled or intimidated[3] by

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1217 (1st Cir. 1989) (First Amendment retaliation claim brought by public employee); *Washington v. County of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004) (First Amendment retaliation claim brought by public employee); *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001) (First Amendment retaliation claim brought by prisoner); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003) (First Amendment retaliation claim brought by prisoner); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) (First Amendment retaliation claim brought by prisoner). Indeed, as discussed *infra*, the Second Circuit has distinguished the private citizen line of cases from the prisoner and public employee cases.

[3] The Eleventh Circuit's suggestion that the First Circuit's use of the word "intimidated" somehow indicates the First Circuit was not applying an actual chilling test, (Pet. App. 18a-19a n.4), ignores the manner in which the First Circuit applied its rule to the facts of the case. Specifically, the First Circuit concluded the absence of any chilling effect, in and of itself, negated any suggestion that plaintiff was intimidated. *See Sullivan*, 888 F.2d at 4 ("The facts indicate that [plaintiff] was anything but intimidated. As shown by the December, 1985 filing of the present action, [plaintiff's] alleged[] [retaliatory act] never intimidated [plaintiff].").

Moreover, the Eleventh Circuit failed to recognize the numerous courts within the First Circuit that have cited *Sullivan*

[defendant's alleged retaliatory conduct]. . . . . Absent such an allegation, no violation occurred. . . . . Where a chilling effect is speculative, indirect, or too remote, finding an abridgment of First Amendment rights is unfounded.") (emphasis added); *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) ("[P]laintiff must show . . that his First Amendment rights were "actually chilled." . . . . **Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech.**") (emphasis added); *Connell v. Signoracci*, 153 F.3d 74, 79 (2d Cir. 1998) ("A plaintiff asserting . . . a First Amendment claim must allege[, among other things,] the defendant's action **effectively chilled the exercise of the plaintiff's First Amendment rights.**") (emphasis added); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995) (finding no chilling effect where, after an arrest, the plaintiff continued to publish his newspaper through which he criticized the village government); *Spear v. Town of West Hartford*, 954 F.2d 63, 67 (2d Cir. 1992) (finding no chilling effect where, after the filing of the lawsuit, the plaintiff continued to write criticizing editorials in the same manner as before the lawsuit).

In an effort to dispel the conflict amongst the Courts of Appeals, the Eleventh Circuit, citing

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for the very same proposition as asserted by Petitioners, *i.e.*, that a plaintiff must show an actual chilling of his or her First Amendment rights to give rise to a viable claim. *See, e.g., Penney v. Town of Middleton*, 888 F. Supp. 332, 338 (D.N.H. 1994); *Abany v. Fridovich*, 1994 U.S. Dist. LEXIS 13049, at **15-16 (D. Mass. Jun. 20, 1994) (unpublished); *Therrien v. Hamilton*, 849 F. Supp. 110, 114 (D. Mass. 1994).

Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004) -- a case involving a First Amendment retaliation claim brought by a public employee -- indicated that "cases from the Second Circuit appear to take contradictory positions" concerning application of the "actual chilling" versus the "ordinary firmness" tests. (Pet. App. at 19a n.5). The Eleventh Circuit, however, failed to recognize that the Second Circuit has consistently applied the "actual chilling" test to First Amendment retaliation claims brought by private citizens, such as the case here.

Specifically, in *Gill v. Pidlypchak*, the Second Circuit explained it has "impose[d] an actual chill requirement" in the "line of cases . . . involving criticism of public officials by private citizens" while the "ordinary firmness" test has been applied in the prisoner context. 389 F.3d 379, 381 (2d Cir. 2004).

Since *Gill*, cases within the Second Circuit have continued to apply the "actual chilling" test in the private citizen context. *See, e.g., Gill v. Calescibetta*, 2005 U.S. App. LEXIS 26821, at*4 (2d Cir. Dec. 7, 2005) ("the [d]istrict [c]ourt granted summary judgment on the ground that plaintiff could not demonstrate that his speech was 'actually chilled' -- **a required element of a First Amendment retaliation claim in non-prison contexts**.") (citing *Curley*, 268 F.3d at 72-73) (emphasis added) (unpublished); *Dutkiewicz v. Hyjek*, 135 Fed. Appx. 482, 484 (2d Cir. 2005) (rejecting First Amendment claim where, among other things, "plaintiffs failed to allege that their speech was chilled") (unpublished); *Griffin-Nolan v. Providence Washington Ins. Co.*, 2005 U.S. Dist. LEXIS 12902, at *24-25 (N.D.N.Y. Jun. 20, 2005) ("All the Second Circuit cases

that the Court has found involving a private citizen plaintiff who alleges the defendant arrested him in retaliation for his exercise of First Amendment rights have articulated the same formulation of the elements of a First Amendment retaliation claim as did *Curley*.") (unpublished).

Moreover, along with differentiating its private citizen versus prisoner cases, the Second Circuit has distinguished its private citizen from its public employee cases. *See Morrison v. Johnson*, 429 F.3d 48, 51 (2d Cir. 2005) ("Where the plaintiff is a public employee alleging that he suffered an adverse employment action as retaliation for the exercise of his First Amendment rights, the standard is not the principle applied in *Curley*."); *Gill v. Calescibetta*, 2005 U.S. App. LEXIS 26821, at **5-6 (2d Cir. Dec. 7, 2005) ("[I]**n the narrow context of prisoner retaliation suits**, a prisoner need not demonstrate 'an actual or subjective chill.'") (emphasis altered from original and internal citations omitted) (unpublished).

Given the differentiating standards applied by the Second Circuit in the private citizen, prisoner, and public employee contexts, neither *Washington* nor *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001) -- a prisoner case quoted in *Washington* as support for the "ordinary firmness" test -- change the fact that the Second Circuit has applied and adopted an "actual chilling" test for First Amendment retaliation claims brought by private citizens.

In addition, the Eleventh Circuit's attempt to dispel the fact that a "circuit split" exists on the issue,

(Pet. App. at 8a), is in conflict with the views of its sister circuits which have recognized such a split exists:

For example, in *Rees v. Dahl*, the Tenth Circuit noted:

> Although we agree with the district court's ultimate conclusion that [plaintiffs'] complaint should be dismissed for failure to state a claim upon which relief can be granted, we rely on our own standard, announced in *Worrell [v. Henry*, 219 F.3d 1197 (10th Cir. 2000)] (objective chilling), rather than the Second Circuit's standard announced in *Spear [v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992] (subjective chilling). In *Worrell*, we expressed our own three-part standard for evaluating First Amendment retaliation claims, which differs from the standard articulated by the Second Circuit in *Spear*. Whereas *Spear*'s standard focuses on a **subjective** chilling, *Worrell*, which binds us, provides for an **objective** standard.

24 Fed. Appx. 907, 910-11 (10th Cir. 2001) (unpublished) (emphasis in original).

Similarly, in *Keenan v. Tejeda*, the Fifth Circuit recognized the differing views of the courts, comparing decisions of the First, Second, and Fourth Circuits with decisions of the Ninth and Tenth Circuits:

> The district court correctly ruled that a retaliation claim requires some showing that the plaintiffs' exercise of free speech has been

> curtailed.[4] *See Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000); *Spear v. Town of West Hartford*, 954 F.2d 63, 67 (2d Cir. 1992); *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989), *but see Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("It would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity."); *Smith [v. Plati]*, 258 F.3d [1167,] 1177 [(10th Cir. 2001)] ("The focus . . . is upon whether a person of ordinary firmness would be chilled, rather than whether the particular plaintiff is chilled.").

290 F.3d 252, 259-60 (5th Cir. 2002); *see also Tucker v. City of Richmond*, 388 F.3d 216, 220 (6th Cir. 2004) ("this Circuit – **unlike some others** – has held that the relevant question is whether the defendants' actions are capable of deterring a person of ordinary firmness") (emphasis added and internal citations, quotations, and emphasis omitted).

Petitioners respectfully maintain the Eleventh Circuit's decision to adopt the "ordinary firmness" test was in error and that the First and Second Circuit decisions applying the "actual chilling" test are correct for several reasons. First, § 1983 is a tort statute, and as such, a § 1983 plaintiff should have to show an actual injury to prevail on his or her claim. Indeed, the

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[4] While the framework announced by the Fifth Circuit in *Keenan* included the ordinary firmness test, 290 F.3d at 258, the court went on to apply the test by inquiring whether plaintiffs showed some actual chilling of their First Amendment rights. *See id.* at 259-60.

Second Circuit's decision in *Colombo v. O'Connell* captures the essence of Petitioners' position:

> To state a claim under Section 1983, a plaintiff must allege facts indicating that some official action has caused the plaintiff to be deprived of his or her constitutional rights – in other words, there is an injury requirement to state a claim. In this case, [plaintiff] need not show that she was silenced by [defendant's] threatened suit – the First Amendment protects the right to free speech so far as to prohibit state action that merely has a chilling effect on speech.
>
> However, **to sustain her claim, [plaintiff] is required to show that the defendant's actions had some actual, non-speculative chilling effect.** Because [plaintiff] testified in her deposition that her speech was not restricted in fact by [defendant's] letter, that she "still felt free to speak up about whatever she wanted to say" after receiving [defendant's] letter, and alleged no actual chilling effect on the exercise of her First Amendment rights at all, [plaintiff's] claim fails.

310 F.3d 115, 117 (2d Cir. 2002) (emphasis added) (citations omitted); *see Curley*, 268 F.3d at 73 ("Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech.").

Likewise, here, Respondents have produced no legally sufficient evidence indicating any actual change or curtailment of their First Amendment activities as a

result of Petitioners' alleged conduct.[5] In fact, the evidence shows just the opposite: that Respondents continued to exercise their First Amendment rights in spite of Petitioners' alleged retaliatory conduct. *See* Reid Depo. at 92, 95, 156, 246 (indicating Reid voted in

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[5] In an effort to show their First Amendment rights were, in fact, chilled, Respondents simply pointed to their self-serving, conclusory deposition testimony in which they asserted they were "less willing" and "more reluctant" to participate in the political process as a result of Petitioners' alleged retaliatory conduct. (Respondents' 11th Cir. Br. at 43-44).

Contrary to the Eleventh Circuit's suggestion, (Pet. App. 15a), such self-serving, speculative, and conclusory assertions are insufficient to demonstrate an actual chilling of First Amendment rights – particularly given the undisputed evidence showing Respondents continued to participate in the political process despite Petitioners' alleged retaliatory conduct. *See, e.g., Columbo*, 310 F.3d at 117 ("[T]o sustain her claim, [plaintiff] is required to show that the defendant's actions had some actual, non-speculative chilling effect."); *Curley*, 268 F.3d at 73 (concluding plaintiff showed no chilling of his First Amendment rights when, although "he was arrested in retaliation for his comments made during the 1993 mayoral campaign, he continued his 1994 campaign for village trustee even after the arrest and ran again for public office in 1995"); *Hankard v. Town of Avon*, 126 F.3d 418, 424 (2d Cir. 1997) ("[P]laintiff's allegations fall short of constitutional significance. The chilling effect alleged by the plaintiffs is speculative, indirect and remote, and there is no evidence in the record that plaintiffs did in fact suffer a cognizable constitutional deprivation."); *Singer*, 63 F.3d at 120 (rejecting First Amendment claim where plaintiff "failed to allege with sufficient particularity any actual `chilling' of his speech, or of his participation in the political process"); *Spear*, 954 F.2d at 67 (2d Cir. 1992) (rejecting First Amendment retaliation claim where "[Plaintiff's] allegation of a chill . . . was conclusory and speculative"); *Sullivan*, 888 F.2d at 4 ("Where a chilling effect is speculative, indirect, or too remote, finding an abridgment of First Amendment rights is unfounded.").

the primary for sheriff; voted in the sheriff election run-off; contributed to Sheriff Hendrix's opponent's election campaign; and voted in general election); Bennett Depo. at 71, 136, 253 (indicating Bennett attended fundraiser for and contributed money to Sheriff Hendrix's opponent, attended Sheriff Hendrix's opponent's election night party). Accordingly, Petitioners respectfully maintain that Respondents have failed to demonstrate a constitutional violation – let alone one that was clearly established at the time of Petitioners' alleged conduct – and thus Petitioners are entitled to qualified immunity.

Second, by adopting the "ordinary firmness" test as opposed to the "actual chilling" test, the Eleventh Circuit has transformed retaliation claims into a "subspecies of First Amendment claims" which are given heightened protection. As former Chief Justice Rehnquist observed in his dissent in *Crawford-El v. Britton*:

> If the purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails, it is hard to see how that purpose is substantially advanced if petitioner's suit is allowed to proceed. Petitioner has already fully exercised his federally guaranteed rights. Providing compensation to him, even if his claim is meritorious, will foster increased constitutional freedoms only for the hypothetical subsequent individual who, given the imposition of liability in this case, will not be deterred from exercising his

> First Amendment rights out of fear that respondent will retaliate . . . .

523 U.S. 574, 608-09 (1998) (Rehnquist, C.J., dissenting) (joined by O'Connor, J.) (internal citations and quotations omitted).

Finally, the "actual chilling" test is consistent with the injury-in-fact requirement of federal justiciability law and the Court's instruction that "allegations of a subjective `chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

In view of the conflict between the Courts of Appeals concerning the appropriate standard for assessing whether a private citizen plaintiff has suffered an "adverse action" sufficient to support a First Amendment retaliation claim, as well as the justifications supporting the adoption of the "actual chilling" test, Petitioners respectfully maintain that certiorari is warranted.

B. Deciding This Case Together With Two Related Cases For Which Certiorari Has Already Been Granted Will Allow The Court To Clarify The Standards Applicable To First Amendment Retaliation Claims And The Adverse Action Requirements Of Both First Amendment Retaliation And Title VII Cases

In *Hartman v. Moore*, Case No. 04-1495, the Court will be considering whether a First Amendment

retaliatory prosecution claim can exist when the prosecution was supported by probable cause. Moreover, in *Burlington Northern Santa Fe Railway Co. v. White*, Case No. 05-259, the Court will be deciding the appropriate test to be applied to determine whether a plaintiff has suffered an "adverse employment action" under Title VII of the Civil Rights Act of 1964.

Deciding this case together with *Hartman* and *White* will allow the Court to cohesively clarify the standards applicable to First Amendment retaliation claims and the "adverse action" requirements of both First Amendment retaliation and Title VII cases.

C. This Case Presents The Court With The Opportunity To Clarify Whether The Law Can Be Sufficiently Clearly Established To Defeat A Government Official's Qualified Immunity When The Central Issue Of The Case Is One Of First Impression In The Governing Circuit And Conflicting Decisions Exist On The Issue Outside That Circuit

Despite the lack of binding precedent on the central issue of this case (what constitutes an "adverse action" sufficient to give rise to a valid First Amendment retaliation claim by a private citizen) and conflicting decisions from the Courts of Appeals that have addressed this question, the Eleventh Circuit rejected Petitioners' qualified immunity defense.

While the Courts of Appeals are split as to which decisional sources may be utilized when assessing the "clearly established" prong of the qualified immunity

analysis,[6] this Court has indicated that the law is too undeveloped to overcome qualified immunity where there is an absence of binding precedent from the governing circuit on the issue presented and conflicting decisions exist from the other circuits that have addressed the issue:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful. . . . . Given such an undeveloped state of the law, the officers in this case cannot have been expected to predict the future course

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[6] *Compare Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir. 2002) ("In inquiring whether a constitutional right is clearly established, we must look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.") (internal quotations and citation omitted) *with Capoeman v Reed*, 754 F.2d 512, 514-15 (9th Cir. 1985) ("[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established . . . . Where . . . there are relatively few cases on point, and none of them are binding, an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same results as courts which had previously considered the issue.") *with Marsh v. Butler County*, 268 F.3d 1014, 1032-33 n.10 (11th Cir. 2001) (en banc) ("When case law is needed to "clearly establish" the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state.").

> of constitutional law. Between the time of the events of this case and today's decision, a split amongst the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages. If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.

Wilson v. Layne, 526 U.S. 603, 617-18 (1999) (internal citations and quotations omitted); *see also Moore v. Hartman*, 388 F.3d 871, 885 (D.C. Cir. 2004), *cert. granted*, 125 S. Ct. 2977 (2005) ("The law of other circuits may be relevant to qualified immunity, but only in the event that no cases of `controlling authority' exist in the jurisdiction where the challenged action occurred.").

Given the Eleventh Circuit's implicit decision to the contrary, this case presents the Court with the opportunity to clarify whether the law can be sufficiently clearly established to defeat a government official's qualified immunity when the central issue of the case is one of first impression in the governing circuit and conflicting decisions exist on the issue outside that circuit.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,
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No. 04-12256

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DANNY M. BENNETT, DANNY L. REID, TAMMY R. BENNETT,
Plaintiffs-Appellees,

versus

DENNIS LEE HENDRIX, Individually and in his Official capacity as Sheriff of Forsyth County, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, DAVID W. WATERS, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County,
Defendants-Appellants,

JAMES L. LOCKHART, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, JOHN DOES, 1-10, Individually and in their Official Capacities as Deputy Sheriffs and/or Officers of the Forsyth County Sheriff's Department, et al.,
Defendants.

September 9, 2005, Decided

September 9, 2005, Filed

COUNSEL: For Dennis Lee Hendrix, Earl A. Singletary, Appellants: Phillip E. Friduss, Hall, Booth, Smith & Slover, PC, Atlanta, GA.

For David W. Waters, Appellee: Phillip E. Friduss, Hall, Booth, Smith & Slover, PC, Atlanta, GA.

For Danny M. Bennett, Danny L. Reid, Tammy R. Bennett, Appellees: Eric S. Chofnas, Attorney at Law, Alpharetta, GA.

JUDGES: Before BLACK and WILSON, Circuit Judges, and NANGLE *, District Judge.

OPINION BY: WILSON

OPINION: WILSON, Circuit Judge:

Plaintiffs Danny M. Bennett and Danny L. Reid filed a complaint alleging that Dennis L. Hendrix, former Sheriff of Forsyth County, Georgia and Earl A. Singletary and David W. Waters, deputies who served under Hendrix, violated their civil rights. Plaintiffs alleged that these officers carried out a campaign of police harassment and retaliation after plaintiffs supported a county referendum opposed by the sheriff. After the district court entered an order denying the officers qualified immunity, they brought this appeal. We find no error in the district court's order, and therefore affirm.

I. BACKGROUND

In 1998, Forsyth County, Georgia voters considered a referendum that would have established a county-wide police force and diminished the power of the Forsyth County Sheriff's Department.[1] Most of the Department's powers would have been transferred to the county police, and the Sheriff would have been

under the supervision of county officials. Sheriff Hendrix opposed the referendum. The plaintiffs are local business owners who supported the referendum. Along with other citizens, they formed a committee in support of the referendum and sponsored a debate on the matter.

The referendum was defeated at the polls, but the plaintiffs allege that Hendrix (along with the other defendants, fellow Sheriff's Department officers) engaged in a campaign of retaliation and intimidation against the plaintiffs because of their support of the referendum. The plaintiffs allege that Hendrix formed a "Strike Force" within the Department to carry out this process of intimidation.

Among many other acts of intimidation, they allege the defendants took down license tag numbers of cars at a forum in support of the referendum, surveilled the plaintiffs' homes and businesses, set up roadblocks near their homes, stopped their cars without reason and issued false traffic citations, accessed government databases to obtain confidential information on the plaintiffs, attempted to obtain a warrant for their arrest on trumped-up environmental charges, and mailed flyers to 35,000 homes in Forsyth County calling the plaintiffs the "real criminals," members of a "chain gang," and "the same type of criminals that terrorize Forsyth County."

According to the plaintiffs, most of these events occurred shortly before the 2000 election, and were designed to intimidate the plaintiffs from opposing Hendrix's re-election that year. The plaintiffs assert that the intimidation tactics were successful. Although

the plaintiffs voted and made campaign contributions during the 2000 election cycle, they allege that the defendants' actions chilled them from engaging in further political activities like they did in 1998.

The plaintiffs sued under 42 U.S.C. § 1983 in 2000, alleging violations of the First, Fourth, and Fourteenth Amendments, as well as a conspiracy to violate their civil rights, along with several state tort laws. The district court granted summary judgment to the defendants on most of these claims, but denied summary judgment on the plaintiffs' claim of retaliation in violation of the First Amendment, their § 1983 conspiracy claim, and state law claims against Hendrix, Singletary, and Waters. The defendants moved for summary judgment based on the defense of qualified immunity. The court held that the defendants were not entitled to qualified immunity because they had violated the plaintiffs' constitutional rights, and those rights were clearly established at the time. Accordingly, the district court denied summary judgment.[2]

II. JURISDICTION AND STANDARD OF REVIEW

Although the defendants' appeal is interlocutory, we have jurisdiction to review the district court's decision on qualified immunity pursuant to 28 U.S.C. § 1291 and Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817, 86 L. Ed. 2d 411 (1985). We review *de novo* the district court's decision denying qualified immunity, drawing all factual inferences in the nonmovant's favor. Durruthy v. Pastor, 351 F.3d 1080, 1084 (11th Cir. 2003). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

III. DISCUSSION

Our procedure in assessing qualified immunity is well-established. Government officials acting within their discretionary authority are not eligible for qualified immunity from suit when the facts "taken in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a constitutional right" and "the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

We have already determined, in an earlier appeal in this case, that "it is apparent that the defendants were acting within the scope of their discretionary authority." *See Bennett v. Hendrix*, 77 Fed. Appx. 504 (11th Cir. 2003) (unpublished). The defendants had to establish this fact to be able to claim qualified immunity. Once they satisfied that burden, the burden shifted to the plaintiffs to establish a constitutional violation. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002).

A. Violation of a Constitutional Right

The precise test for determining whether the defendants' actions violated the plaintiffs' rights against retaliation is an issue of first impression in this Circuit. We first survey the law of other Circuits. To

state a retaliation claim, the commonly accepted formulation requires that a plaintiff must establish first, that his speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech. *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005); *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). The only prong at issue here is the second.[3] We must determine the standard for demonstrating an adverse effect on protected speech.

The other Circuits apply an objective test: "a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine*, 411 F.3d at 500; *see also Washington v. County of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004) ("In the context of a First Amendment retaliation claim, we have held that 'only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action.'") (quoting *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001)); *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003) ("The ordinary-firmness test is well established in the case law . . . ."); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003) (plaintiff must allege adverse action "sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights") (alteration in original); *Keenan*, 290 F.3d at 258 (ordinary firmness test is the "settled law of other circuits"); *Toolasprashad v. Bureau of Prisons*, 351 U.S. App. D.C. 64, 286 F.3d 576, 585 (D.C. Cir. 2002) ("The

widely accepted standard for assessing whether harassment for exercising the right of free speech is actionable . . . depends on whether the harassment is likely to deter a person of ordinary firmness from that exercise.") (internal quotations and alterations omitted); *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001) ("The alleged injury should be one that would chill a person of ordinary firmness from continuing to engage in that activity.") (internal quotations omitted); *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("The proper inquiry asks whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.") (internal quotations omitted); *Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999) (*en banc*) ("An adverse action is one that would deter a person of ordinary firmness from the exercise of the right at stake."); *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1217 (1st Cir. 1989) (retaliation cause of action is stated "only when the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations"); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (harassment for exercising the right of free speech not actionable if it was "unlikely to deter a person of ordinary firmness from that exercise").

The defendants point to other cases applying a subjective test, under which the plaintiffs would have to show that they were actually chilled in the exercise of their First Amendment rights. *See Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) (plaintiff must show that First Amendment rights were "actually chilled") (quoting *Davis v. Vill. Park II Realty Co.*, 578 F.2d 461, 464 (2d Cir. 1978)).[4] For the reasons that

follow, we join our sister Circuits in adopting an objective test for proving a retaliation claim.

First, although their decisions are not binding on us, we find the fact that every other Circuit has adopted the objective "ordinary firmness" test to be persuasive. Even accepting the defendants' premise that a few scattered cases applying a subjective "actual chill" test amounts to a "circuit split," the vast majority of cases apply the objective test. n5 We agree with the courts that have called the "ordinary firmness" test "well established," *Garcia*, 348 F.3d at 728, "widely accepted," *Toolasprashad*, 286 F.3d at 585, and "settled law," *Keenan*, 290 F.3d at 258.

Second, we are persuaded not only by the number of courts applying the "ordinary firmness" test, but by the reasoning of those decisions as well. An objective standard provides notice to government officials of when their retaliatory actions violate a plaintiff's First Amendment rights. In contrast, "a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending upon the plaintiff's will to fight." *Constantine*, 411 F.3d at 500. "It would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity. . . ." *Mendocino Envtl. Ctr.*, 192 F.3d at 1300. There is no reason to "reward" government officials for picking on unusually hardy speakers. At the same time, we recognize that government officials should not be liable when the plaintiff is unreasonably weak-willed or suffers only a "*de minimis* inconvenience to her exercise of First Amendment rights." *Constantine*, 411 F.3d at 500

(internal quotation omitted); *see also* Bart, 677 F.2d at 625 ("It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . . ."). The "ordinary firmness" test is therefore protective of the interests of both government officials and plaintiffs alleging retaliation.

The defendants contend that "something more than the mere retaliatory act is necessary to give rise to an actionable claim." *Appellants' Brief* at 12. They are correct, but as we have explained, the "something more" is an adverse affect, and "adverse effect" depends on context. Specifically, private citizens must establish that the retaliatory acts would deter a person of ordinary firmness from exercising his or her First Amendment rights. The defendants' reliance on retaliation cases in the public employment context is misplaced, because different interests are at stake there. In the employment context, the required adverse action in a retaliation claim is an "adverse employment action." *See Stavropoulos v. Firestone*, 361 F.3d 610, 616 (11th Cir. 2004), *cert. denied*, 161 L. Ed. 2d 727, 125 S. Ct. 1850 (2005). Plainly, private citizens cannot suffer adverse employment actions at the hands of public officials who are not their employers. As the Fourth Circuit explained,

Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts. *See Thaddeus-X v. Blatter*, 175

F.3d 378, 398 (6th Cir. 1999) ("The definition of adverse action is not static across contexts."). For example, in the public employment context, the speaker is the employee and the retaliator is the public employer. The employment relationship between the speaker and retaliator creates competing interests between "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."

Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2002) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811 (1968)) (alterations in original). As the Fifth Circuit pointed out, "in the employment context, this court's requirement of an adverse employment action serves the purpose of weeding out minor instances of retaliation." *Keenan*, 290 F.3d at 258 n.4. In other words, minor instances of retaliation would not chill a person of ordinary firmness because they did not even amount to an adverse employment action.

The balance of interests is different when the plaintiff is a private citizen, and those interests require at least as much protection against retaliation for a private citizen as they would for a public employee. n6 *See Thaddeus-X*, 175 F.3d at 398 ("Public employees . . . may be required to tolerate more than average citizens, before an action taken against them is considered adverse."); *see also Keenan*, 290 F.3d at 258 (noting that "this case does not involve an employment or other contractual relationship between the plaintiffs and the governmental officials" and instead concerns "an

ordinary citizen"); *Naucke v. City of Park Hills*, 284 F.3d 923, 927-28 (8th Cir. 2002) (applying "ordinary firmness" test to private citizen's retaliation suit); *Poole*, 271 F.3d at 960 (same); *Suarez Corp.*, 202 F.3d at 686-87 (distinguishing between public employee and private citizen plaintiffs).

In sum, language from the cases, including our decision in *Stavropoulos*, requiring an adverse employment action in order for a public employee to state a retaliation claim does not necessitate that a private citizen plaintiff plead more than that the defendant's retaliatory acts are such as would chill a person of ordinary firmness. As we have stated, for private citizen plaintiffs, the objective test allows for a "weeding out" function when the injuries complained of are trivial or amount to no more than *de minimis* inconvenience in the exercise of First Amendment rights.

The defendants next assert that the "ordinary firmness" test allows plaintiffs to state a claim even when they have not suffered an injury sufficient to give them standing to sue. We disagree. The plaintiffs' claim depends not on the denial of a constitutional right, but on the harassment they received for exercising their rights. "The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." *Thaddeus-X*, 175 F.3d at 394 n.9 (quotation omitted). "For Article III standing purposes, then, the 'plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' As long as the injury is 'distinct and palpable' rather than abstract, conjectural, or hypothetical, it is sufficient to

confer standing." *Id.* at 394 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984)).

The defendants' reliance on *Laird v. Tatum*, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972), is misplaced. In that case, the plaintiffs alleged a chilling effect based on the mere existence of the government's alleged program of surveillance of citizens. *Id.* at 2, 92 S. Ct. at 2320. The plaintiffs "freely admit[ted] that they complain of no specific action of the Army against them." *Id.* at 9, 92 S. Ct. at 2323. The Supreme Court held that this alleged injury was insufficient to confer standing. *Id.* at 13-14, 92 S. Ct. at 2325-26.

However, the *Laird* Court noted that, "in recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Id.* at 11, 92 S. Ct. at 2324 (collecting cases). Moreover, "the decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." *Id.* at 12-13, 92 S. Ct. at 2325. The standard established in *Laird* is that "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14, 92 S. Ct. 2325-26. The standard we adopt today is consistent with *Laird*. The objective "ordinary firmness" test requires plaintiffs to allege that the retaliatory acts of the defendants adversely affected them, which is an injury sufficiently adverse to give rise to Article III standing. *See*

Thaddeus-X, 175 F.3d at 394.

As a final reason for approving of the objective standard, we note that it is consistent with statements in our own cases, even though we have not explicitly adopted the "ordinary firmness" test. In *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983), we enjoined a malicious prosecution action filed by state officials in retaliation against a citizen's lawsuit against those officials. *Id.* at 1190. We noted that "petitioner-appellant alleges more than that his freedom to exercise his right to petition will be chilled in the future. He alleges current deprivation, in the form of penalization for having exercised his right to petition in the past." *Id.* at 1188. We went on to state, "this does not mean, however, that only if a plaintiff can prove actual, current chill can he prove irreparable injury. On the contrary, direct retaliation by the state for having exercised First Amendment freedoms in the past is particularly proscribed by the First Amendment." *Id.* at 1189. Thus, we did not focus on the plaintiff's subjective, actual chilling. Instead, we objectively assessed the defendants' actions and declared that an actual chill is not necessary to state a First Amendment violation: "The *source* of that chill . . . provides the critical irreparable injury to those citizens, regardless of whether actual chill is proved." *Id.*; *see also Holloman v. Harland*, 370 F.3d 1252, 1268-69 (verbal censure from school official for student's silent protest during recitation of Pledge of Allegiance was a punishment intended "to dissuade [student] from exercising a constitutional right" and "cannot help but have a tremendous chilling effect on the exercise of First Amendment rights").

For all of the foregoing reasons, today we expressly adopt the following standard: A plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.

We now apply this standard to the plaintiffs' allegations, and readily conclude that the plaintiffs have alleged facts that a jury could find would deter a person of ordinary firmness from the exercise of First Amendment rights. In Judge Posner's words, "the effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable." *Bart*, 677 F.2d at 625.

The alleged retaliatory acts complained of here include a prolonged and organized campaign of harassment by local police officers. Taken in the light most favorable to the plaintiffs, the record is replete with instances where the defendants followed, pulled over, cited, intimidated, or otherwise harassed the plaintiffs. The defendants allegedly accessed confidential government databases containing information on the plaintiffs, attempted to obtain arrest warrants against the plaintiffs without probable cause, and produced and mailed to Forsyth County residents flyers depicting the plaintiffs as criminals terrorizing the county.

Other courts applying the "ordinary firmness" test have concluded that similar or less harassing acts constitute an adverse effect. *See Garcia*, 348 F.3d at 729 (the retaliatory issuance of parking tickets totaling $ 35 created a jury issue because the defendant "engaged the punitive machinery of government in order to

punish Ms. Garcia for her speaking out"); *Keenan*, 290 F.3d at 259 (one plaintiff stated a retaliation claim that would chill a person of ordinary firmness with allegations that officers stopped his car and detained him for an unreasonable time, "allegedly with their guns drawn during part of the traffic stop, and ultimately issued only a minor traffic citation that was later dismissed"); *Bloch v. Ribar*, 156 F.3d 673, 680-81 (6th Cir. 1998) (in response to plaintiff's criticism, sheriff publicly released confidential and humiliating details of plaintiff's rape; such act was sufficiently adverse to chill a person of ordinary firmness); *Bart*, 677 F.2d at 624-25 ("campaign of petty harassments" against the plaintiff including "holding her up to ridicule for bringing a birthday cake to the office" stated a cause of action for retaliation). Likewise, we held in *Cate* that a civil malicious prosecution suit brought by public officials could be sufficiently retaliatory to chill the plaintiffs' exercise of First Amendment rights. *Cate*, 707 F.2d at 1189.

Additionally, the plaintiffs testified that they were, in fact, actually chilled in the exercise of their rights because they did not participate in the 2000 election to the degree they would have but for the defendants' alleged actions. We note that "the question is not whether the plaintiff herself was deterred, though how plaintiff acted might be evidence of what a reasonable person would have done." *Garcia*, 348 F.3d at 729; *see also Constantine*, 411 F.3d at 500 ("While the plaintiff's actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment activity, it is not dispositive."). In sum, we conclude that the acts alleged here, if true, are sufficiently adverse that a jury could find they would

chill a person of ordinary firmness from exercising his or her First Amendment rights.

B. Clearly Established Law

The final step in the qualified immunity inquiry is determining whether the law was clearly established so as to put the defendants on notice that their behavior violated the plaintiffs' rights. A right is clearly established if, in light of already-existing law, the unlawfulness of the conduct is "apparent," *see Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987), and if a constitutional rule applies with "obvious clarity" to give an official "fair warning" that violating that right is actionable. *Vinyard*, 311 F.3d at 1350-52. We conclude that the law was clearly established at the time of the defendants' alleged actions that retaliation against private citizens for exercising their First Amendment rights was actionable.

This Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights. *See Cate*, 707 F.2d at 1186 (punishment for exercise of First Amendment rights violates First Amendment); *see also City of Houston v. Hill*, 482 U.S. 451, 462-63, 107 S. Ct. 2502, 2510, 96 L. Ed. 2d 398 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."); *see also Leslie v. Ingram*, 786 F.2d 1533, 1537 (11th Cir. 1986) ("An intentional and wrongful retaliation for the assertion of a constitutionally protected right is a substantive civil rights violation which may be

prosecuted in a federal court pursuant to 42 U.S.C. § 1983. . . ."), *abrogated on other grounds by Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); *Ga. Ass'n of Educators v. Gwinnett County Sch. Dist.*, 856 F.2d 142, 145 (11th Cir. 1988) ("The Government may not retaliate against individuals or associations for their exercise of First Amendment rights 'by imposing sanctions for the expression of particular views it opposes.'") (quoting *Smith v. Ark. State Highway Employees*, 441 U.S. 463, 464, 99 S. Ct. 1826, 1827-28, 60 L. Ed. 2d 360 (1979)).

Because this Court has held since at least 1988 that it is "settled law" that the government may not retaliate against citizens for the exercise of First Amendment rights, *Ga. Ass'n of Educators*, 856 F.2d at 145, we hold that the defendants were on notice and had "fair warning" that retaliating against the plaintiffs for their support of the 1998 referendum would violate the plaintiffs' constitutional rights and, if the plaintiffs' allegations are true, would lead to liability under § 1983.

IV. CONCLUSION

For the reasons stated above, we conclude that, taking the facts in the light most favorable to the plaintiffs, the defendants' "conduct violated a constitutional right" and that "the right was clearly established." *Saucier*, 533 U.S. at 201, 121 S. Ct. at 2156. Accordingly, we affirm the order of the district court denying summary judgment and denying the defendants qualified immunity from suit.

AFFIRMED.

* Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

n1 We present the facts in the light most favorable to the plaintiffs, the party opposing summary judgment. *Young v. City of Palm Bay*, 358 F.3d 859, 860 (11th Cir. 2004).

n2 The court granted summary judgment for the defendants as to the claims brought by plaintiff Tammy Bennett, and she is not a party to this appeal. Likewise, the district court granted summary judgment on the plaintiffs' claims against the additional defendants. Thus, the only issue before us is the entitlement of Hendrix, Singletary, and Waters to qualified immunity.

n3 In the district court, the defendants conceded the first prong, that the plaintiffs' support for the 1998 referendum was protected speech. In addition, the defendants have never pointed to any indication in the record that they would have undertaken their allegedly retaliatory actions even absent the plaintiffs' speech. Accordingly, we agree with the district court that the plaintiffs have shown that there exists at least a genuine issue of material fact as to the third (causation) prong.

n4 The defendants also cite *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir. 1989), as adopting an "actual chill" standard. However, the plaintiff there failed to allege any adverse action, and thus could not show sufficient injury to create standing. *Id.* at 4. Moreover, the court noted that the proper standard was whether the plaintiff's "speech was in fact chilled *or intimidated*." *Id.*

(emphasis added). Therefore, we do not read *Sullivan* to adopt unequivocally a subjective test.

n5 We note that cases from the Second Circuit appear to take contradictory positions. *Compare Washington v. County of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004) (objective standard) *with Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) (subjective standard). We leave it to that Court to settle this disparity.

n6 We note that several courts have applied the "ordinary firmness" test even in the prison context. It follows that a private citizen, not subject to the expected deprivations of prison life, deserves at least as much protection from retaliation. *See Mitchell*, 318 F.3d at 530; *Toolasprashad*, 286 F.3d at 585; *Thaddeus-X*, 175 F.3d at 398. We have held that "to state a First Amendment claim for retaliation, a prisoner need not allege violation of a separate and distinct constitutional right. . . . The gist of a retaliation claim is that a prisoner is penalized for exercising the right of free speech." *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir. 2003) (alterations omitted) (quoting *Thomas v. Evans*, 880 F.2d 1235, 1242 (11th Cir. 1989). For example, a prisoner can state a claim of retaliatory transfer even though he does not have a constitutional right not to be transferred. *Bridges v. Russell*, 757 F.2d 1155, 1157 (11th Cir. 1985). Thus, nothing in our prisoner retaliation cases is inconsistent with adopting an "ordinary firmness" test for private citizens.

CIVIL ACTION FILE NO. 1 :00-C V-2520-T W T

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

DANNY M. BENNETT, et al., Plaintiffs,

v.

DENNIS LEE HENDRIX, Individually and in his official capacity as Sheriff of Forsyth County, et al., Defendants.

Filed 4/13/2004

ORDER

This is a civil rights action brought under 42 U.S.C. §§ 1983 and 1985(3). It is before the Court pursuant to an order from the Court of Appeals for the Eleventh Circuit vacating this Court's order deferring a ruling on qualified immunity until trial. For the reasons set forth below, this Court holds that the Defendants are not entitled to qualified immunity.

I. BACKGROUND

The Plaintiffs supported a referendum to establish a county-wide police force in Forsyth County, Georgia. They allege that the former Sheriff of Forsyth County, who opposed the referendum, retaliated against them, and deprived them of their constitutional rights through a campaign of illegal surveillance, harassment, and defamation. Plaintiff Danny L. Reid is a grading contractor doing business though his company, Reid &

Reid, LLP, in Gumming, Georgia. Plaintiff Danny M. Bennett is an engineer and a general contractor. Bennett's company is Georgia North Contracting, Inc., operating out of Gainesville, Georgia. Plaintiff Tammy R. Bennett is Danny Bennett's wife. Defendant Dennis Lee Hendrix was Sheriff of Forsyth County, Georgia during the time of the events at issue. Defendants Earl A. Singletary and David W. Waters served as Chief Deputy Sheriff and Deputy Sheriff, respectively, under Sheriff Hendrix.

In 1998, the Plaintiffs[1], along with other Forsyth County residents, supported a referendum to create a county-wide police force in Forsyth County. The Plaintiffs and others formed a committee to help advance the referendum and support the establishment of a county police force. The committee met all the requirements mandated by law for such committees as set out in O.C.G.A. § 2I-5-30. The creation of a county police force would have effectively transferred the law enforcement powers of the sheriff to the county police. The Plaintiffs allege that Sheriff Hendrix adamantly opposed the referendum effort. They allege that the Sheriff and his deputies engaged in conduct that was meant to threaten and intimidate public discourse on the subject. For example, the Plaintiffs allege that Sheriff Hendrix ordered his deputies to patrol the parking lot where a public debate on the issue was held and to write down the automobile tag numbers of the citizens who attended the debate. The referendum to establish a county police force was defeated.

The Plaintiffs allege that Sheriff Hendrix and his department retaliated against them because they took a public stance in favor of the referendum. The actions

allegedly taken by Sheriff Hendrix include ordering deputies to follow the Plaintiffs for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; on two occasions stopping Plaintiff Tammy Bennett near her residence without probable cause and issuing false and pretextual traffic citations; unlawfully accessing county and state records to obtain confidential information regarding the Plaintiffs to be used for harassment; maliciously using such information to defame Plaintiffs Reid and Bennett; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds. Sheriff Hendrix allegedly announced the formation of a "Strike Force" at a staff meeting on February 9, 1999. The purpose of this special force was to carry out the intimidation campaign.

In an order dated June 21, 2001, this Court dismissed the Plaintiffs' claims based upon the Fourth Amendment, the Due Process Clause of the Fourteenth Amendment, and section 1983 supervisory liability. The Court also dismissed several other state law claims against Defendants Hendrix, Singletary, Waters, and John Does (1-10). The Defendants subsequently moved for summary judgment on the remaining claims for violations of the First Amendment and section 1983 conspiracy liability. In an order dated February l, 2002, this Court granted summary judgment as to the claims based on retaliatory speech (the campaign fliers) and equal protection, and denied summary judgment as to the claims based on retaliatory conduct against the Plaintiffs. Due to inadequate briefing, the Court

deferred ruling on the Defendants' qualified immunity defense until after the presentation of evidence at trial.

Defendants Hendrix, Singletary, and Waters filed an interlocutory appeal challenging this Court's decision to defer determination of qualified immunity until trial. On July 25, 2003, the Court of Appeals for the Eleventh Circuit vacated the order deferring ruling on qualified immunity and remanded. The Court of Appeals found the facts in the record sufficient to determine that the Defendants had met their initial burden to prove that they were acting within the scope of their discretionary authority. The Court of Appeals remanded for this Court to rule on qualified immunity before trial. The mandate was issued on September 3, 2003. Rebriefing on the issue was completed on December 18, 2003.

II. DISCUSSION

This action is before the Court for a pretrial ruling on whether the Defendants Hendrix, Singletary, and Waters are entitled to the defense of qualified immunity. "Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct `does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting Harlow v. Fitzgerald 457 U.S. 800, 818 (1982)). The purpose underlying qualified immunity is to allow government officials to carry out their duties without the fear of personal liability or harassing litigation. Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). "[A]ll but the plainly incompetent or one who is knowingly violating the federal law" find protection in qualified

immunity. Id.

The Eleventh Circuit has adopted a two-pronged analysis to determine whether a public official is entitled to qualified immunity. See, e.g., Vinyard, 311 F.3 d at 1346-47; Lee, 284 F.3d at 1194; Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988). First, the official must show that he acted within the scope of his discretionary authority when the challenged conduct occurred. Vinyard 311 F.3d at 1346. In this case, the Court of Appeals has held that all of the challenged actions were representative of standard law enforcement practices, and "it is apparent that the defendants were acting within the scope of their discretionary authority." Bennett v. Hendrix, No. 02-11031 (11th Cir. July 25, 2003). Thus, the Defendants have met their preliminary burden.

Once the defendant official satisfies this initial requirement, the burden shifts to the plaintiff to show that the challenged actions violated the plaintiff's federal rights under clearly established law. This is a two step process. The court must first inquire whether the plaintiff's allegations, if true, establish a constitutional violation. Hope v_. Pelzer, 536 U.S. 730, 736-42 (2002); Saucier v. Katz, 533 U.S. 194, 201 (2001). If a constitutional right has been violated, "the next, sequential step is to ask whether the right was clearly established" at the time of the challenged action. Saucier, 533 U.S. at 201; Lee, 284 F.3d at 1194.

A. Constitutional Violation

The Defendants use the bulk of thei. additional briefing to address the first part of the Hope inquiry - whether

their alleged actions violated the Plaintiffs' constitutional rights. This effort is misplaced as this Court has already held that the Plaintiffs' claims of First Amendment violations and conspiracy survive summary judgment. See Bennett v. Hendrix, No. 1:00-CV-2520-TWT (Order of Feb. 1, 2002 [Doc. 17b], at 18). To determine whether the Defendants' retaliation claims survived summary judgment, this Court applied the three-part test in Suarez Cord. Industries v. McGraw, 202 F.3d 676, 685 (4th Cir. 2000). Viewing the evidence presented in the light most favorable to the Plaintiffs, this Court held that: (1) the Plaintiffs' speech enjoyed constitutional protection; (2) the Defendants' alleged retaliatory actions adversely affected the Plaintiffs' constitutionally protected speech; and (3) there is a genuine issue of material fact as to the causal connection between the protected conduct and the adverse action. Bennett v. Hendrix, No. 1 :00-CV-2520-TWT (Order of Feb. 1, 2002 [Doc. 176], at 14-18). This Court also held that the Plaintiffs sufficiently established a jury question as to their section 1983 conspiracy claims. Id. at 18. "A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." Saucier, 533 U.S. at 201. This initial inquiry requires the Court to employ the same standard of review used in summary judgment determinations - to view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Thus, a holding that the Plaintiffs' constitutional claims survive summary judgment necessarily means

that the initial inquiry must be answered in the affirmative: taken in the light most favorable to the Plaintiffs, the facts alleged indeed show that the officers' conduct violated a constitutional right. As these holdings represent the law of the case, they shall not be reexamined in deciding whether Defendants Hendrix, Singletary, and Waters are entitled to the defense of qualified immunity. Accordingly, the only task remaining for this Court is to determine whether the second part of the Hope test is met - whether the relevant federal law was clearly established when the events at bar occurred.

B. "Clearly Established" Law

The doctrine of qualified immunity originated in Harlow v. Fitzgerald, 457 U.S. 800 (1982), where the Supreme Court held that immunity will be denied only where the official's conduct violated a clearly established federal right. Applying Harlow, the Eleventh Circuit held that such rights are clearly established when they have been previously developed in "such a concrete and factually defined context to make it obvious to all reasonable government actors, in the [official's] place that `what he is doing' violates federal law."' Lassiter v. Alabama A&M University, Bd. of Trustees, 28 F.3d 1146, 1149 (11th Cir. 1994). Until recently, in the Eleventh Circuit, the law was that a plaintiff must show that the federal right in question has been defined by prior cases with "concrete circumstances" and "materially similar" facts. Marsh v. Butler County. Ala., 268 F.3d 1014 (11th Cir. 2001) (en banc); Lassiter, 28 F.3d at 1150.[2] This stringent requirement was satisfied only in the rarest of circumstances, making qualified immunity a "nearly

insuperable obstacle" in the Eleventh Circuit. Omar ex rel. Cannon v. Lindsey, 334 F.3d 124b, 1249 (11th Cir. 2003).

In Hope v. Pelzer, 536 U.S. 730 (2402), the Supreme Court rejected the "materially similar" facts test developed by the Eleventh Circuit to determine whether a right is clearly established. The Court relied on its earlier decision in United States v. Lanier, S20 U.S. 259 (1997), which stated:

[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.

Id. at 271. The Court described the "materially similar" facts test as a "rigid gloss on the qualified immunity standard [that] is not consistent with our cases." Hope, 536 U.S. at 739. Rejecting this requirement, the Court restated the standard for determining whether a right is clearly established:

Our opinion in Lanier . . . makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. indeed in Lanier, we expressly rejected a requirement that previous cases be "fundamentally similar" . . . Accordingly, pursuant to Lanier, the salient question that the Court of Appeals ought to have asked is whether the state of the law [at the time of the challenged action] gave respondents fair warning that

their alleged treatment of Hope was unconstitutional.

Id. at 741. Thus, the Supreme Court rejected the Eleventh Circuit's "materially similar" facts test in favor of a "fair warning" test.

In the wake of Hope, the Eleventh Circuit has given texture to the requirement that an official have fair warning that his action violates a claimant's rights. In Vinyard v. Wilson, 311 F.3d 1340, 1349-55 (11th Cir. 2002), the Court of Appeals identified three categories of cases in which the unlawfulness of an official's conduct is deemed clearly established: (1) where specific words in the federal statute or constitutional provision render the law applicable to the challenged conduct; (2) where judicial decisions clearly apply to a wide variety of factual circumstances; and (3) where precedents involve materially similar facts. Id. at 1350-51. As the first two categories suggest, a plaintiff may overcome the qualified immunity defense without relying on fact-specific case law when a preexisting constitutional rule applies with "obvious clarity" to the conduct in question. Id. at 1352.

The Plaintiffs present no case law with "materially similar" facts declaring the Defendants' specific conduct violative of the Plaintiffs' constitutional rights. Nevertheless, preexisting constitutional law established by the Supreme Court and the Eleventh Circuit apply with "obvious clarity" to the Defendants' alleged actions. The Supreme Court has long held that actions by the police which interfere with the free exercise of speech protected by the First Amendment are subject to suit pursuant to section 1983. City of Houston, Tex. v. Hill, 482 U.S. 451, 461 (1987); Hague v.

Committee for Indus. Organization, 307 U.S. 496,519 (1939). In Terminiello v. City of Chicago, 337 U.S. 1 (1949), the Court underscored the importance of protecting political speech against coercion by public officials:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.

Id. at 4 (citations omitted). The Eleventh Circuit has echoed the Supreme Court's concern that citizens be protected from retaliatory punishment for speech. In Gate v. Oldham, 707 F.2d 1176 (11th Cir. 1983), the Court of Appeals stated:

[T]he test for determining a violation of First Amendment rights has never been whether or not the speaker or petitioner was successful in delivering his message before he was arrested or otherwise penalized for speaking or petitioning. What is relevant is whether any burden on First Amendment freedoms, either in the form of a prior restraint or a sanction imposed to

prohibit or to punish exercise of First Amendment rights is justified by sufficiently compelling state interests. Although prior restraints are especially suspect under the First Amendment, subsequent punishments too can present an infringement of First Amendment rights.

Id. at 1186 (citations omitted). To protect against such conduct, the Eleventh Circuit has held that police retaliation against a private citizen for the exercise of a constitutional right creates an action pursuant to section 1983. Leslie v. Ingram, 786 F.2d 1533, 1537 (11th Cir. 1986) ("An intentional and wrongful retaliation for the assertion of a constitutionally protected right is a substantive civil rights violation which may be prosecuted in a federal court pursuant to 42 U.S.C. § 1983."); Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979).[3] Indeed, the Eleventh Circuit has stated that it is "settled law" that state officials may not retaliate against individuals for the exercise of First Amendment rights. Georgia Assn of Educators v. Gwinnett County School Dist., 856 F.2d 142, 145 (11th Cir. 1988).

Pursuant to Vinyard, if these broad statements of settled law clearly proscribe the challenged acts as unconstitutional, the officials committing the acts would have fair warning that the acts were unlawful and, thus, are not entitled to qualified immunity. Vinyard, 311 F.3d at 1351. The actions allegedly taken by the Defendants include ordering deputies to follow the Plaintiffs for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; unlawfully accessing county and state records to obtain confidential information regarding the Plaintiffs to be

used for harassment; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds. The Plaintiffs have put forth evidence which indicates that they were targeted for this retaliation because of their support of the 1998 referendum. The testimony of Mark Thomas, a former major with the Department and a member of Sheriff Hendrix's command staff, suggests that Hendrix targeted the Plaintiffs for surveillance. (Thomas Dep. at 38-39, 45, 103). The testimony of William Miller, a former lieutenant during Hendrix's term, indicates that Hendrix stated that he would require Miller to investigate 50 to 75 residents who might be opposed to Hendrix's re-election. (Miller Aff. Pars. 7-13).[4] Miller also stated that there was no indication that any of these residents were suspected of any criminal activity or other legitimate basis for such investigations. Id. Thus, the evidence presented, viewed in the light most favorable to the Plaintiffs, indicates that the Defendants ordered or conducted surveillance and harassment of the Plaintiffs in retaliation for the Plaintiffs' public stance in favor of the 1998 referendum. The Plaintiffs' political speech falls squarely within the ambit of the First Amendment. The Defendants' harassment and surveillance of the Plaintiffs fall squarely within the retaliatory conduct clearly proscribed by the settled case law of the Supreme Court and the Eleventh Circuit. Terminiello, 337 U.S. at 4; Georgia Assn of Educators, 856 F. 2d at 145; Leslie, 786 F.2d at 1537; Cate, 747 F.2d at 1186. Indeed, it is difficult, if not impossible, to fathom that a reasonable officer in the Defendants' position would not recognize that

retaliatory surveillance and harassment of political opponents under color of law was a violation of their constitutional rights. As settled case law applied with obvious clarity to the Defendants' alleged retaliatory acts, the Defendants had fair warning that these acts violated the Plaintiffs' constitutional rights. Thus, the Defendant officers' invocation of qualified immunity is improper, and summary judgment on the

Plaintiffs' claims of retaliation based on the Defendants' immunity from suit would be inappropriate.

III. CONCLUSION

For the reasons set forth above, the Defendants' Motion for Summary Judgment on qualified immunity is DENIED.

SO ORDERED, this 12 day of April, 2004.

THOMAS W. THRASH, JR.
United States District Judge

Footnotes

n1Unless otherwise noted, the Court will refer to Danny M. Bennett and Danny L. Reid as the "Plaintiffs."

n2The Eleventh Circuit also made qualified immunity unavailable in the "slender category" of cases in which the official's conduct was so obviously at the core of what the federal right prohibits that the unlawfulness of the conduct would be unquestionably apparent to any official. Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir.

1997).

n3In Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

n4Miller, unwilling to accept a transfer from the Criminal Investigation Division to Internal Affairs to conduct this illegitimate investigation under Defendant Waters, resigned from the Department on February 12, 1999. (Miller Aff. Pars. 7-13).

FILED 11/7/2005

No. 04-12256

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DANNY M. BENNETT, DANNY L. REID, TAMMY R. BENNETT,
Plaintiffs-Appellees,

versus

DENNIS LEE HENDRIX, Individually and in his Official capacity as Sheriff of Forsyth County, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, DAVID W. WATERS, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County,
Defendants-Appellants,

JAMES L. LOCKHART, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, JOHN DOES, 1-10, Individually and in their Official Capacities as Deputy Sheriffs and/or Officers of the Forsyth County Sheriff's Department, et al.,
Defendants.

September 9, 2005, Decided

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

JUDGES: Before BLACK and WILSON, Circuit Judges, and NANGLE *, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court, having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are Denied.

ENTERED FOR THE COURT,
United States Circuit Judge

Footnote

* Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.